Pepperdine Law Review

Volume 43
Issue 5 *Symposium: International Arbitration and the Courts*

Article 2

4-1-2016

Gateway-Schmateway: An Exchange Between George Bermann and Alan Rau

George Bermann

Alan Scott Rau

Gateway-Schmateway: An Exchange Between George Bermann and Alan Rau

George Bermann and Alan Scott Rau*

Jack Coe: It's my distinct honor to introduce both of the lead players in the next program and to explain a little bit about the thinking behind it.

George Bermann is the Jean Monnet Professor of EU Law, the Walter Gellhorn Professor of Law, and the Director of the Center for International Commercial and Investment Arbitration at Columbia Law School. He is an iconic figure in our field and much beloved by his students at Columbia. Alan Rau is the Mark and Judy Yudof Chair in Law at the University of Texas School of Law, known to many as one of the must-read scholars in relation to American arbitration jurisprudence. Their résumés are long and very, very impressive. I have known them both a long time, but in recent years my interactions with them have arisen in connection with the Restatement project. George, of course, is the Restatement's Chief Reporter, and Alan has been one of the project's ALI-appointed Advisers from the project's early days.

We thought it would be interesting today to give an impression of the kinds of conversations to be heard at the by-invitation-only meetings we hold to vet the drafts that we, the four ALI Reporters, prepare. It is the heart of the ALI peer-review process. As many of you know, the time-honored method is that the Reporters produce drafts with commentary and Reporters Notes that support the positions put forth. Two bodies of peer commentators (Advisers and Consultative Group Members) then critique the draft. In Alan's case, that often involves a penetrating and very helpful memo, detailing areas of agreement and his concerns.

In our regular physical meetings, we convene in a large meeting room and, very soon after being called to order, conduct verbal exchanges that go

---

* This exchange is a transcript of a discussion held on April 17, 2015 at Pepperdine University School of Law for the *Pepperdine Law Review*'s symposium, titled "International Arbitration and the Courts." The live recording can be accessed at http://livestream.com/pepperdinesol/lawreviewsymposium2015.

beyond "Arbitration 101." And at the risk of perhaps excluding some newcomers from the field (George and Alan are prone to get into the advanced issues very quickly), we decided to hold an exchange—we originally called it "a debate"—on selected issues that typify the kinds of matters we have traversed during the ALI drafting and consultative process. No doubt there will emerge both areas of agreement and of disagreement.

The written iterations we produce (drafts) are part of a synthesis of ideas, and the process of hearing out Alan and others is very important to that process and always influential. There inevitably are changes made by the Reporters after these meetings to reflect the input of our many learned colleagues from practice, academia, and the bench.

What I propose to do is to frame a topic and try to give enough background so that you can come alongside. And then, let them discuss it according to my interventions as moderator.

Using my discretion as moderator, I will also deputize Professor Chris Drahozal, who is also an Associate Reporter on the Restatement. He has standing to exert a measure of quality control over these proceedings and to intervene as he sees best.

Additionally, as we are going to spill into certain subjects to be examined in a later panel, notably the *BG Group*[1] case, I will also deputize Andrea Bjorklund and Jarrod Wong, who have some deep interest and understanding of this case and who will perhaps want to interject.

Of course, the expectation is that in addition to the free-for-all unfolding on the dais, you will raise your hand, be recognized, and be heard with your question and comment. With those ground rules before us, let me start with the question, or a cluster of questions, that relate to competence-competence.

The relevant Restatement provision, section 2.8, states as follows: "Unless the arbitration agreement provides otherwise, an arbitral tribunal may rule on issues relating to its own jurisdiction, including, but not limited to, the existence, validity, or scope of an international arbitration agreement."

The first question relates to what this power in the tribunal means. American jurisprudence differs from other systems as to the conclusiveness of the arbitrator's jurisdictional determinations. The conversation is complicated by some related questions. One is the extent to which the arbitration agreement is to be treated as a contract separate from the main

1. BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014).

contract. Our Supreme Court has relied on the agreement's legal separateness as part of an approach that prevents courts from deciding the validity of the main contract containing the arbitration agreement (an agreement typically in clause form, but legally separate nonetheless). Accordingly, it is often said that to prevent arbitration when the arbitration clause is invoked before the court, attacks on validity (such as an unconscionability defense) must be directed at the arbitration agreement specifically. As a byproduct, because a court is not to keep the dispute from the tribunal based merely on attacks on the validity of the main contract, the main contract's validity will be for the tribunal to decide. In this connection, *Prima Paint* is the paradigmatic case.[2]

The second question that bears on the competence-competence conversation is the extent to which the parties may affect by agreement the arbitrators' and courts' respective presumptive roles with respect to jurisdiction-related issues. Momentarily, I will invite George to address the two concepts of "allocation" and "delegation" as we have come to use those terms in Restatement parlance. Delegation is the ability of the parties by agreement to rearrange the basic initial "allocation" of jurisdiction-related issues. In other words, what issues related to jurisdiction can the parties remove from the court's presumptive domain and give to the arbitrators for conclusive decision?

An important sub-issue is how the parties must express their intention to delegate. In other words, to be successful in giving issues otherwise reserved for the court to the arbitral tribunal, how must the parties express their intention? We'll see that the *First Options*[3] case offers important guidance in this regard, suggesting that the delegation must be "clear and unmistakable." It is against this standard that courts evaluate, for example, the effect of institutional rules that contain competence-competence provisions.

So, George, can I get you and Alan to weigh in on just clarifying the competence-competence?

George Bermann: Are you going to proceed through your subthemes or should we take them all on at this point?

2. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406–07 (1967).
3. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

Jack: Take them on, and I will return to them if I think they have not been properly addressed.

George: What you described, Jack, was a fairly broad notion of competence-competence. You included in it the validity of the arbitration agreement and even its very existence. We in the United States are not unusual in taking an extremely broad view of competence-competence. It is not an overstatement to say that the arbitrators have competence to decide just about any and every threshold issue, whether we call them issues of jurisdiction or admissibility.

That does not mean, however, that no court will have intervened before the arbitrators were empaneled to address those issues. In the general U.S. law understanding, the competence of arbitrators to determine their own competence is not exclusive; courts may at certain points address them if asked to do so. The competence-competence of arbitrators could be considered exclusive in that courts will simply not address them, at least prior to the arbitration and issuance of the award. French law comes very close to that idea.

In other words, there are certain threshold issues in arbitration that come within the competence-competence of the arbitrators, but not exclusively so, prior to constitution of the tribunal. And, as you implied Jack, there are others that courts simply will not touch at all or, if they agree to do so, only with the utmost of deference to the arbitrators.

We in this country are by no means alone in this view. We do not, in this respect, practice the much-maligned "American exceptionalism."

Alan Rau: Well, I have a somewhat different take on this, but let me say before we get into the substance that, when Jack first suggested the idea of this panel to me, my first reaction was that George and I have discussed these issues, on which we agree or disagree, so many times in our writings, and in person at the Restatement meetings and other conferences, that it may well be thought that there were nothing more to say.

And then it occurred to me that George might react the way Samuel Johnson reacted when, at a meeting of his Literary Club, Oliver Goldsmith proposed that they add fresh members because, Goldsmith said, since we've had the same members for many years "there can be nothing new among us; we have travelled over one another's minds."

And Johnson retorted, with some indignation, "Sir, you have not

traveled over *my* mind, I promise you." And I think that George would probably feel the same way and would say the same thing, so that we are not going to be repeating ourselves, or at least it won't matter so much.

I would like to separate out—and I will try not to use sophisticated foreign terms like competence-competence—I would like to separate out two notions. One is timing: When does the decision take place? And the other question is one of allocation: Who has the final decision-making power? And the latter is the more interesting one.

If something is considered a "jurisdictional" question, that is to say, if it is thought to go to a party's consent to arbitrate, we usually assume that the decision as to whether there is jurisdiction or not, the decision as to who decides whether the arbitrators have jurisdiction, is taken by the court. But, the possibility is open in American law, and almost uniquely in American law, that this question can be allocated with finality to the arbitrators themselves.

And that is where we get to the *First Options* case in which the court, not for the first time but for the most important time, contemplated the possibility that the parties might want to allocate that power to the arbitrators themselves, that is, to entrust them with the final decision-making power with respect to their own jurisdiction.

Now, perhaps we could talk about *First Options*. I was taught when I was in law school that a case can only be understood in light of the precise question that the court had in front of it. The question the court had in front of it in *First Options* is: What to do about someone, Mr. Kaplan, who says he never agreed to arbitrate anything at all and nevertheless has been roped into the arbitration?

That is the core problem. Did I agree to arbitrate anything at all? Outside of that core question, the whole problem of *First Options*, the whole problem of the "clear and unmistakable," becomes far less important because at some point the arbitrator is not an officious intermeddler; he is not a stranger. He is someone that the parties have already consented to and have hired. So, maybe we could talk about the allocation of the decision-making power outside of the area of core consent. Let me give a concrete case because I think concrete cases are the most important.

Let's assume we have a contract that provides (this is an old chestnut) for the arbitration of disputes arising out of the sale of "fruit." One party wants to arbitrate a dispute about the shipment of tomatoes and the question is whether this is governed by the arbitration clause—whether a tomato is a

"fruit" for that purpose. I think it is botanically, but not in common usage.

All right, that is a jurisdictional question. That determines the jurisdiction of the arbitrators to hear tomato-related disputes. I would suggest—*First Options* or not—that it makes a lot of sense for that question to be allocated to the arbitrators, and for us to presume that it should be allocated to the arbitrators. I wonder what George feels about that case.

George: Oh, I'm glad to answer.

Chris Drahozal: Can I make one suggestion? Can you set out three simple examples that everybody agrees on, as far as forgery of an arbitration clause?

Alan: Now we're getting into the other question though.

[Laughter]

Chris: I'm sorry, that might be beyond that.

Jack: We'll come back to, in particular, severability and focus on the main contract and defects in the main contract, but as we knew from the very beginning, these are not easily compartmentalized and so the conversation keeps spilling over into severability.

Chris: Okay.

Jack: But, your basic point, I think is a good one. It would be great to come up with some common ground.

George: Okay. What Alan has done in his remarks is begin to unpack consent. I assume Alan agrees with Mr. and Mrs. Kaplan when they said that their consent was at stake and that a tribunal's jurisdiction over them in the context of the dispute was very much in question. When insisting that they were non-signatories and that there was no basis for piercing the veil between them and their company, they were raising a jurisdictional objection.

What Alan very respectably wants to do, I think, is to say: "Well, that doesn't pertain, at least not equally, to questions of the scope of the

agreement to arbitrate." And the usual rationale is that it is one thing to say, "I never agreed to arbitrate," and it is another to say, "Well, I did agree to arbitrate, but I didn't agree to arbitrate *that*."

As Alan views things, the latter question is exclusively, or at least primarily, for the arbitrators. But I disagree.

The consent of the parties is as much at stake when the parties deny agreeing to arbitrate a particular question as when they deny agreeing to arbitrate at all. Therein lies, I think, the key difference between us.

Now we come to what we call in the Restatement the question of delegation. A matter can be one that it is ordinarily appropriate for a court to decide prior to arbitration but that the parties should be able to remove from any judicial consideration at that stage.

The Restatement puts the question of scope of the agreement to arbitrate that Alan posits—namely, whether a tomato is a fruit—in the category of issues over which parties may fully delegate authority to the arbitrators. But Alan wants the presumption to go the other way, that is, this question should be presumptively for the arbitrators alone at the outset, so that there is no room or need to speak of delegating authority over it to them.

But, of course, Mr. and Mrs. Kaplan's objection was not one of scope. They said: "We never signed the damn thing at all." It is very hard to see how they could possibly, under those circumstances, have delegated the matter to the arbitrators. If the purported delegation is embedded in an arbitration agreement that a party contests ever having subscribed to, I find it very hard to treat that agreement as having effected a delegation of authority to decide the jurisdiction of the tribunal.

Jack: So you would agree that in a post-dispute agreement about whether or not I'm bound by this agreement, whether I'm even a party to it, they could delegate in that manner, and that's what you refer to as extrinsic?

George: Yes, and we take that view, but only with respect to post-dispute agreements.

Alan: Well, let's go back a bit. I don't think we have much problem, much disagreement on the problem of Mr. Kaplan. But let's go back to the question of tomatoes. "Consent" certainly is at issue. Another way of saying it, "jurisdiction" is at issue. But it's not reasonable, I think, to look at this monolithically.

If the parties have agreed to arbitrate *something*, the question then becomes one of presumption, one of the choice of a proper default rule. Did they, having agreed to arbitrate something, agree to arbitrate *this dispute*?

Now, how do you determine that? You don't determine it by labels, like "clear and unmistakable," you ask: What would reasonable parties have done? The interest of most contracting parties, I would think, is to minimize cost. Costs are of two kinds. There are error costs: Who knows best? Who is best capable of interpreting the agreement? Who has the comparative advantage? Expertise in interpreting what the parties were likely to have meant by "fruit"—those are error costs.

And then you have transaction costs. You want to ensure what the English call "one-stop adjudication." We don't have to go to courts and to arbitrators in various layers of adjudication. It's much more efficient and reduces cost to do it all at the same time.

Both of those things cut in favor of a presumption that the fruit issue, the tomato issue, should be assumed to be allocated to the arbitrators in the first instance without the need of any delegation. Because that's probably the majoritarian default rule.[4]

And I was very interested in what Chris Drahozal was saying about the Delaware statute earlier because it seems to me that what the Delaware statute is saying, is giving us, is that same presumption about the arbitrability of scope issues.

And I took Chris to say, "That's no big deal. It goes without saying; it's what American courts have been doing." And I think that's right.

Chris Drahozal: You could do it that way. The parties could do it that way.

Alan: Well it's the presumption of the statute, as I understand what you were saying in terms of "substantive arbitrability."

Chris: Yes.

4. As one member of the Court suggested at the time of oral argument in *First Options*, "Whenever you submit issues to arbitration, in effect you're consenting to a kind of rough-and-ready disposition of whatever your claims or disputes may be, and therefore there's no reason to sort of draw the fine lines as to what you were rough and ready about." Transcript of Oral Argument at *43–44, First Options of Chi., Inc. v. Kaplan, 514 U.S. 938 (1995) (No. 94-560).

Alan: And it is a presumption that American courts have been applying. And I think it's a sensible presumption in light of why we have presumptions in the first place, which is to reduce probable costs, and it is, therefore, in accord with the probable intention of the parties. And I have not even mentioned the word "delegation" because I don't think you need it.

Jack: Okay, I think it would be useful for George to talk about the derivation of the word "delegation" because people ask about it. And maybe even talk about allocation because it shows up throughout the Restatement, chapter two in particular.

George: Yes, I would be glad to do that, but I can't resist going back to the scope question for a minute longer. What about the absurd scenario in which you and I are landlord and tenant and have a lease with an arbitration agreement? But we're also engaged in a completely different contractual relationship—the sale of a used car, for example—evidenced by a contract that does not have an arbitration clause in it at all.

Now, surely, you don't want, in a case in which the claim has absolutely nothing to do with the lease (i.e., has only to do with the used car) for a court to send us to arbitration. But that is where the logic of your position takes us.

Alan: No. I think I disagree that I was saying that it is not consent-based. I think it is consent-based, but it's a different kind of problem. It raises a different kind of problem, and so we need to devise the appropriate default rule for that problem.

You have given me a case where I think the default presumption is probably rebutted. But in the fruit and tomato case, the default presumption is that this must be for the arbitrators to decide because this has to be what reasonable parties interested in reducing cost would want—that presumption is very strong and not rebutted.[5]

5. It strikes me that a more coherent and cogent answer might perhaps have run something like this: To say that "jurisdictional issues are presumptively allocated to the arbitrator when they require interpretation of the agreement" is to say that deference is due only *to real exercises in interpretation*. I would presume that an arbitral reading of "fruit" to encompass "tomatoes" would fall within the original grant of power by contracting parties; an arbitral reading of "fruit" to encompass "heavy industrial machinery" would probably not and so would begin to resemble an excess of authority. As Judge Posner wrote, "[T]he grosser the apparent misinterpretation, the likelier it is that the arbitrators weren't interpreting the contract at all." Hill v. Norfolk & Western

George: Okay, let's move on.

Alan: Sure.

George: Jack asked about the concepts of allocation and delegation. Now allocation is relatively easy because we have been discussing presumptive allocation of authority throughout this discussion. And in our universe, that is all that allocation means. It means that we have threshold questions, and we have two potential decision makers over them. We want some degree of clarity over the authority that arbitrators and courts, respectively, have over those questions.

Now, in the Restatement, we began to wonder whether the parties are at liberty to alter the presumptive allocation. To alter the allocation in the direction of removing something from the arbitrators and reserving it to a court is, I think, completely unproblematic. No one has to arbitrate anything they did not agree to arbitrate. So reallocating in that direction never worried us very much. The only thing that worried us about that was that once you posit that something ordinarily for the arbitrators to decide is now for courts to decide, you must furnish the courts a choice-of-law rule. The moment we make something delegable back to a court, then we are duty-bound as Restaters to guide the court as to what law they should apply, whereas were the matter to remain with the arbitrators, we would have no choice-of-law determination to make.

On the other hand, whether the parties can divest the authority of courts to decide a threshold issue they presumptively have authority to decide is a more difficult question. Even use of the term delegation in that direction was thought to be problematic. Some Advisers thought the term improperly implied a hierarchy in which courts occupy a higher place in the hierarchy and arbitral tribunals are their inferiors.

Now, of course, that's not the intention at all. And we now try to make that perfectly clear. If we were writing on a clean slate, and maybe we should do so, I would prefer that we referred to "reallocation" rather than "delegation." But, delegation is the term the Supreme Court has adopted.

Jack: Now, just for some of my students, a reminder of what we're talking about here. We start off by positing that the tribunal has the

Ry. Co., 814 F.2d 1192, 1195 (7th Cir. 1987). The same is so in the case posited by George.

competence to determine its own competence—that is, to decide, for example, if the parties indeed agreed to arbitrate the dispute placed before the tribunal. And you said in your mind those are—virtually without restriction—all jurisdictional issues.

George: Right.

Jack: That there is wide competence in the tribunal to decide such issues does not, of course, mean that they have that prerogative to the exclusion of courts. In fact, the competence is concurrent, and when a court is invited to decide jurisdictional questions, subsidiary rules intervene to indicate if it should, instead, let the arbitral tribunal be the first to consider the issue. This is the question of "allocation." It is different from the question of what deference a court should accord a tribunal's determinations on jurisdiction—that is, when, later, the award is before the court.

Alan: No, but this can happen even before the award if someone asked for an injunction against the arbitration on the grounds that the arbitrators have no jurisdiction.

George: I mean, it can, but it will happen at the end.

Jack: So, whenever the arbitrators' decisions come before the court (usually when the award comes before the court), there will be the separate issue of the relative conclusiveness of the tribunal's rulings on jurisdiction. But, at the moment, in connection with allocation and delegation, we are focused on the stage at which the agreement to arbitrate is invoked before a court.

George: It will certainly happen at the end. All the substantive arbitrability questions may come up if they are still around at the award stage.

But what we are focusing on here, and in the chapter that is coming before the ALI annual meeting in May, is when the question of this arises at the agreement enforcement stage.

Jack: So, now to the narrow application of what we've been calling delegation. Granted that the parties can delegate jurisdictional issues,

whichever ones we agree upon, can they do that, or should they be assumed to have done that, by virtue of naming in their arbitration clause institutional rules that have a competence-competence provision?

We are referring to a provision that says the tribunal has the power to determine its own jurisdiction, including issues relevant to the existence, scope, and validity of the agreement. That may occur in combination with a wide arbitration clause that provides that the tribunal shall decide "any and all issues related to this contract" and that its award shall be "final." Assuming the "clear and unmistakable" test governs the delegation question of which we speak, should the above rules provisions, alone or in combination, be deemed to have satisfied the test?

Does that suffice? Or, given what we just said about competence-competence, is that ambiguous in that it could just convey that the tribunal need not stop the proceeding to refer to a court to first decide jurisdictional issues?

Alan: Can I just reframe that question?

Jack: Please.

Alan: I think the question is a fair question, but it's phrased perhaps a little tendentiously. By the way, as I tried to say earlier, I think "clear and unmistakable" is just "one overblown latke."[6] It really does not have much to do with the scope problem.

But let me rephrase the question about the rules. As the Court in *First Options* said, parties may, if they wish to, delegate jurisdictional issues to arbitrators.

Immediately after that, the AAA amended its rules expressly for the purpose of picking up on that possibility and giving to arbitrators the power to decide with finality, as *First Options* contemplated, jurisdictional questions.

There was no particular reason at that point to amend the rules to do anything else, right? No one suggested that the arbitrators—when their jurisdiction is challenged—have to pack up their papers, turn off the lights,

6. "'This is all one big overblown latke,' Rabbi Levi Shemtov said of the fuss over the White House's Hanukkah party," which some criticized as having been "downsized" in comparison to its predecessors. Rachel L. Swarns, *Washington Fuss Over White House Hanukkah Party*, N.Y. TIMES, Dec. 11, 2009, at A28.

and go away—this was not a serious issue. The intent was obviously to pick up on the hint that the Supreme Court gave in *First Options*.

So I would rephrase your question: given that legislative history, isn't it clear that when people arbitrate under AAA rules, they intend to pick up on that same assumption that the AAA drafters wanted to?

George: And that, of course, is not tendentious.

Alan: No, it's not tendentious in the slightest.

[Laughter]

Jack: No, well, and so you're adding to the consideration of whether they actually achieved it, what they were attempting to do.

Alan: Yes, absolutely. George has made the point in one of his articles that this wasn't perhaps the subjective intention of contracting parties. But we never know what the subjective intentions of contracting parties are.

That's always inconclusive, but in construing contracts we look at the backstory, we look at the legislative history, we look at what the draftsmen were trying to do. We look at what most reasonable people would have gotten, gleaned from the language.

Jack: But, if you look at the pre-*Kaplan* provisions that used to state the competence-competence principle, they weren't much different from the amended ones. And I know what they were trying to do, but for your average party looking at a new iteration of the ICC or ICDR rules, they are going to see yet another competence-competence provision, except perhaps for its greater detail, making it more specific in its itemization of jurisdiction-related issues than its predecessor.

Alan: Well I'm not sure, I would have to compare the language. But the amendments were made, whatever they were, for the express purpose of responding to the invitation of the Supreme Court. I don't think that's questioned.[7]

7. I now gather that the AAA Commercial Arbitration Rules contained no reference at all to competence-competence at the time the *First Options* decision was handed down in 1995; indeed,

George: Well, I think the change was made to reflect the apparent comfort of the Court with treating a plain vanilla competence-competence clause as clear and unmistakable evidence of an intention to deprive courts of authority over jurisdictional—even existence—questions at the outset.

By the way, Alan and I occasionally agree. But I nevertheless want to say for the record that few people have Alan's combination of being both contrarian and constructive. We need that in the Restatement, and it is a function that Alan admirably performs.

Now, here is my concern. First of all, it does not really matter how many times you place the term competence-competence in your agreement or in your rules. In the prevailing U.S. view, competence-competence is simply not exclusive.

My second concern is something I voiced at our last Restatement meeting, and it too has impact. I agree with Alan that we should not "make too much" of the requirement of clear and unmistakable evidence. But *First Options* did establish a presumption that needs to be overcome. Yet every institutional rule I know of has in it a competence-competence clause. And the great majority of arbitration laws, at least modern ones, including the UNCITRAL Model Law, also have a competence-competence clause in them. One may well ask how many arbitrations are there going to be where there isn't a competence-competence clause either in the rules or in the *lex arbitri*. Arbitrations that take place in a place that has no competence-competence clause in the *lex arbitri* and under rules containing a competence-competence clause are few and far between.

Now, if that's the case, then we have done away with any semblance of a requirement of the clear and unmistakable evidence test for delegating jurisdictional matters to the arbitrators. The presumption simply is no longer what it was; indeed, it is no longer. That troubles me a lot.

Finally, I do not agree with Alan that the intention behind amendment of the AAA Rules has anything to do with any of this. I don't really care what the drafters of the AAA Rules meant in this context. I care what the parties

---

even the version of the Rules effective July 1, 1996 contained no such provision. What is now Rule 7(a) appeared for the first time only in 1998 and was expressly "designed to address" Justice Breyer's invitation in *First Options*. By contrast, the AAA's International Arbitration Rules—closely modeled on the UNCITRAL Rules—had a provision as early as 1991 (Article 15.1) that stated that "the tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." *International Dispute Resolution Procedures*, AM. ARB. ASS'N 26 (June 1, 2009), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_002037.

meant. I'm not prepared to impute the rule-drafters' intention to the parties. To do so is, I think, misguided.

Alan: Well, how do you get at the intention of the parties given the fact that the subjective intention of contracting parties will be unknowable by definition? You have to make certain guesses.

I've always thought that when you interpret agreements you make guesses based on the backstory, the legislative history, what happened to get to that point, and what the people who drafted it had in mind has to be, at least, a relevant piece of data. But, leaving that aside, if you don't agree with that, how do you get at what the intention of the parties is?

George: Well, first of all, I object to the use of the word "legislator."

Alan: Sure, sure, sure. That's tendentious.

George: I love the AAA. I love the drafters of the AAA Rules, but they are not yet legislators.

Jack: Aren't you on the AAA Council or the board?

George: I'm a AAA director, but I'm still not a legislator. I quite agree with you, Alan, that the parties' intentions on the specific matter before us are quite inscrutable. But, I nevertheless take *First Options* as my point of departure.

If you were to take *First Options* away from me completely, I would then be more in your universe.

Alan: Well, I would think it best to marginalize it precisely because of the peculiar fact situation, which is not the one we're talking about, but after *First Options* came the *PacifiCare* case.[8] Maybe we could just talk about that, and then we can go onto something else.

That was a case where the contract between the parties said: "No punitive damages." The question is whether the arbitrators could award RICO treble damages. That is to say, whether RICO treble damages were included in the contractual ban on punitive damages. The Court said,

8. PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401 (2003).

without citing *First Options*, that's for the arbitrators to decide.

It seems to me that is very close to saying that the interpretation of the contract, on the point of whether the arbitrators were authorized to award RICO damages or not, is something that is presumptively given to the arbitrators themselves. And that was done without any reference to *First Options*. Isn't that the case we're talking about?

George: Well, I think it's fair to say that in *PacifiCare*, the premise was that whether treble RICO damages were punitive was seriously arguable.

Alan: Sure.

George: I think that's fundamental there. But, if it were clear that treble damages were punitive and punitive damages were categorically excluded by the parties' agreement then the tribunal would lack authority to grant them. It would be for a court to determine whether, under those circumstances, the RICO claim was arbitrable. But, maybe we're now already into that very question; namely, whether the exclusion of punitive damages is an authority question.

Alan: That's the move that I would make if I were in your shoes.

[Laughter]

George: Okay.

Jack: Well, and in fact, I was initially next going to move to *BG Group* for a short look, but now, let us jump that . . .

George: Let's reverse that order.

Jack: . . . [A]nd go to your question. Here's the question. We're talking now about, and here's my hypothetical clause, in the contract it says: "Consequential damages shall not be available under this contract." So the award comes out, and the tribunal has given what appeared to be consequential damages. Is that a matter of the merits, or does that fall within the remedial jurisdiction?

Is it a question of remedial jurisdiction so that the court ought to look at

it, not with deference and not view it as merits, which is not one of the bases of vacatur, but as something more fundamental? And we dealt with it in a Restatement, and George loses a lot of sleep over how we did so. But we can't come up with anything better, so maybe you could speak to that.

George: But we had, what was it seven alternatives.

Audience Member: You had seven.

George: Okay, I added one.

Jack: George loves alternatives.

George: I move it from six to seven, but we already had six. And you were responsible for that group—the six.

Audience Member: Not on my own.

George: [laughs] Okay. So here's the concern, and Jack has put it very well. And it's a sad commentary that Alan and I spent half of yesterday's cocktail party talking about this. But it's a fact.

Is a prohibition on the award of consequential damages an authority question? Is part of the definition of the authority of the arbitrators the remedies that they can grant? That is the fundamental question. And let me just say for the sake of completeness that we have two U.S. cases that I am aware of, both of which say in effect—one more plainly than the other—that it's a merits rather than an authority question. So, the award cannot be denied enforcement partially because to question whether consequential damages may be granted amounts to second-guessing the arbitrators.

The other case—the *Fertilizer Corp. of India* case[9]—is one in which the tribunal again awarded consequential damages, but this time the tribunal went to the trouble of explaining why it was awarding damages that the parties had excluded.

Its reasoning was very interesting. The contract contained a choice-of-law clause designating English law, and under the arbitrator's understanding of English law, one loses the protection of an exclusion of consequential

9. Fertilizer Corp. of India v. IDI Mgmt., Inc., 530 F. Supp. 542 (S.D. Ohio 1982).

damages in the case of a fundamental breach.

Now, that arbitrator had a good deal going for him, at least in terms of logic. He applied English law the way he understood it. And as he understood it, English law rendered the consequential damages clause unenforceable. And so he did exactly what he should have done.

So I am not of the view that the fact that an arbitrator awarded consequential damages when they are categorically prohibited means that the arbitrator exceeded his authority in awarding them. But it is not too much, if we are to accept that result, to demand an explanation.

I would like to posit for discussion's sake the scenario in which the consequential damages prohibition is found directly in the arbitration clause. Now, if I'm not mistaken, Alan is of the view that that would change nothing, and the availability of consequential damages is still not an authority question.

Alan: That's right.

George: I have a very hard time seeing the availability of consequential damages as anything but an authority question if the exclusion of consequential damages is found in the arbitration clause itself and says something along the lines of "the arbitrator shall decide any and all disputes arising under or related to this contract but shall not award consequential damages under any circumstance."

I have a very hard time treating this as a pure merits question. The provisions of a contract are largely about the rights and obligations of the parties.

But then there will be an arbitration clause and there might be a remedy clause. Now, what distinguishes the arbitration and remedy clauses from all the other clauses in the contract is that those clauses address the authority—the power—of the arbitrators.

So I would not drive a sharp wedge as some would between the question, on the one hand, of whether a tribunal has resolved a question not put to it (clearly an authority question) and the question, on the other hand, whether a tribunal used its authority in order to grant a remedy that the contract said the tribunal could not award.

The question before us is a really interesting question; namely, whether the scope of arbitral authority can depend only on what was arbitrated and cannot depend on the use made of that authority.

And I just want to add that in my travels, there is no provision of the Restatement that comes in for as much criticism, indeed as much disbelief, as the one understood to mean that when a tribunal grants a remedy that the parties categorically excluded, it does not exceed its authority.

I think it's one thing to say, "I don't care what they said. I'm awarding consequential damages anyway," and it's another thing to do what was done in the *Fertilizer* case. In the latter, the tribunal stated a rationale for granting a remedy that the parties appear to have excluded. I submit that the former is an excess of authority, and the latter is not.

That proposal was met with a purely predictable response, which was: If you allow an inquiry into whether the arbitrators reasoned before they awarded consequential damages, you introduce the proverbial camel's nose under the tent and usher in the end of arbitration.

Alan: Well, may I say that you get contracts that are drafted to say: "Plaintiff shall not be awarded, and claimant shall not be entitled to, punitive damages." Then you have contracts that say: "The arbitrator shall not award punitive damages" or "The arbitrator has no authority to award punitive damages."

Sometimes it's in article one of the contract, and sometimes it's in article seventeen of the contract. I think it's totally fanciful to think that any of this makes any difference to contracting parties who didn't have that—I can't believe they would have that in mind—and they're not drawing these fine distinctions in terms of intention.

I thought the Restatement's position is that it doesn't make any difference whether it's in article one or seventeen or whether they say no authority or no punitive damages—it is all assumed to be for the arbitrator.

The *PacifiCare* case I mentioned involved a number of different contracts. Some of them said: "The arbitrator shall have no authority to award punitive damages." Some of them said: "Punitive damages shall not be awarded." The Supreme Court acted as if it made absolutely no difference how the clause was phrased. It assumed that the availability of such damages would in any event be for the arbitrator, and I think that's absolutely right and gets us right back to the tomatoes case.

Given the fact that we're dealing with presumptions or default rules anyway, the parties can always contract around it if they really want to limit the authority of the arbitrator. So, it's a question of where you start. And I can't believe that using language that nobody pays any attention to in the

drafting stage should be interpreted as a limitation on the arbitral tribunal.

George: But that's not the premise of my position. My premise is exactly yours. We drew a distinction between "do the arbitrators have the authority to award consequential damages" and "does the contract allow consequential damages." I think that distinction is as artificial as you do.

And my position does not turn on that distinction all. I don't much care how the arbitration clause is phrased any more than you do. But I do reject the premise that all we care about when it comes to excess of authority is whether the arbitrators resolved a claim or issue not put before them, disregarding whether they did something as arbitrators that the contract forbade them to do.

Jack: Well, we're going to hear from Andrea Bjorklund, who was asked to intervene, but we soften the presumption by saying what some might consider weasel words. But I think it is in keeping with the best approach we could come up with. This presumption can be rebutted, however.

Whether the presumption is rebutted depends on various factors bearing on the parties' intent in formulating the provision, including whether the provision clearly refers to the tribunal's authority rather than contractual remedies; negotiating history of the provision; whether the provision is located in the arbitration clause; the presence of the law of the arbitral seat . . .

Alan: Talk about the kitchen sink.

Jack: . . . [O]f relevant limits on the tribunal's remedial powers; and the tribunal's own recent assessment, or lack thereof—this was George's point—concerning the parties' intent, including its characterization of the limitation in question. There was no period in there anywhere. In other words, that is rebuttable based on several considerations.

Andrea Bjorklund: I was just going to say that.

Jack: She is relinquished.

Andrea: No, I was just going to offer that, you know, that the U.S. and the Canadian investment treaties limit the authority of arbitrators to the

award of money damages, or in the case of expropriation, to restitution of property. But in the alternative, the arbitrator has to give them a monetary amount for the state to choose, which option that it would prefer. And that I have always considered to be an authority question and that the arbitrators just did not have the authority to go beyond that.

Most investment treaties don't specify. You have a default rule under customary international law about what the arbitrators can do. Of course, in practice, they mostly give money damages because that's what people want and because there are enforcement problems if they try to go beyond that.

Jack: Well, that reminds me to apologize.

Chris Drahozal: Do you want to reiterate Andrea's comment because she doesn't have a microphone?

Jack: Andrea said, and I will foreshorten it considerably, that . . . .

[Laughter]

Jack: No—only because I'm not going to remember all of the eloquence, dear colleague.

Alan: I think you are making things worse, not better.

[Laughter]

Jack: Yeah, maybe I should just shoot myself and, you know.

[Laughter]

Jack: Isn't it time for lunch yet? Those treaties, BITs, some of this will be the new model BIT for the United States, vintage 2012, I guess.

Andrea: NAFTA.

Jack: Oh, NAFTA has this? Ah. So, it has been in place for a while. It limits, and she assumes it's an authority provision, the discretion of the tribunal to grant, it says, "No punitive damages." And it says, "In principle,

damages, but extraordinary restitution." Am I remembering correctly what you said?

Andrea: Restitution in the event of expropriation.

Jack: Restitution in the event of expropriation. That is, you can get your property back.

Andrea: With an alternative damage measure.

Jack: With an alternative damage measure. I'm sorry. I would have taken notes if I knew Chris was going to catch me on it. And so, her point was why is that not a limit on authority? She has always taken that to mean authority. Meaning, if a tribunal granted punitive damages, it would be exceeding its authority quite clearly.

She brought up investor-state arbitration. I'm apologizing for having teased the *BG Group* case, but there is plenty of time after lunch to get into it. And we will have some good commentators on it. I have time for one more question before lunch.

Alan: Are we going to do the severability thing?

Jack: Well, it. . . .

Alan: [laughs]

Jack: How many of you will give up fifteen minutes of lunch time to hear about severability ?

Alan: Yeah, right.

[Laughter]

[crosstalk]

Jack: We touched on the point Alan would have made if I had given him more time. I want to initiate a round of applause for what I think was very stimulating, and as advertised, two heavyweights going at it. And I

think we have some common ground and some that we will never agree on.

[Applause]

***